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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

ASA FARMS, INC., a California corporation and
BRAGA RANCH

Case No. C08-00122-JF

Plaintiffs,

**NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
OCEANO PACKING CO., LLC.'S
MOTION FOR INTERVENTION**

v.

FRESH 'N HEALTHY, INC., a Delaware corporation; MARK WILLIAMS, an individual; JACK PARSON, an individual; STEVEN CINELLI, an individual; CHAD HAGEN, an individual; SANTOS MARTINEZ, an individual; DON BEAM, an individual; DARRYL NICHOLSON, an individual; RICHARD MAY, an individual; THOMAS COLOGNA, an individual; PRESTWICK PARTNERS, LLC, a California limited liability company; SOLSTICE VENTURE PARTNERS, LLC, a business entity form unknown; VFINANCE INVESTMENTS, a business entity form unknown; FMP VINEYARD, LLC, a New Mexico limited liability company; BUTTONWOOD OPTION, LLC, a business entity form unknown; DW, LLC, a business entity form unknown; M SOLAZZO TRUST 2002; P. SOLAZZO 1998; GIBBONS FAMILY TRUST; BIXLER TRUST; STEIGERWALD TRUST and CARTER TRUST, COMERICA BANK and DOES 2 through 50, inclusive.

DATE: April 4, 2008
TIME: 9:00 a.m.
PLACE: Courtroom 3, 5th Floor
JUDGE: Judge Jeremy Fogel

Defendants

1 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 4, 2008 at 9:00 a.m. or as soon thereafter as counsel may
3 be heard by the Honorable Jeremy Fogel of the United States District Court for the Northern District of
4 California, San Jose, Division, located at 280 South First Street, San Jose, California 95113, Defendant
5 OCEANO PACKING, CO., LLC ("OCEANO") will, and does hereby move this court, pursuant to Federal
6 Rule of Civil Procedure, ("F.R.C.P."), 24(a)(2), for an order permitting OCEANO to intervene as "of
7 right" in this pending action, namely, ASA Farms, Inc., et al. v. Fresh 'N Healthy, Inc., et al., Case Number
8 C08-00122JF ("Pending Action"), and to file its proposed Complaint-In-Intervention against the
9 defendants named therein. Alternatively, OCEANO will, and does hereby move this court, to permit
10 OCEANO to intervene pursuant to F.R.C.P. 24 (b)(1)(B) in the Pending Action in order to file its
11 Complaint-In-Intervention against the defendants named therein.

12 This Motion is based on this Notice of Motion and Memorandum of Points and Authorities the
13 Declaration of Effie F. Anastassiou in Support of Oceano Packing, Co.'s Motion to Intervene, and
14 accompanying exhibits thereto, filed concurrently herewith, including, without limitation the proposed
15 Complaint-In-Intervention, the [Proposed] Order filed concurrently herewith, and the pleadings and papers
16 on file herein, and upon such other matters as may be presented to the Court at the time of the hearing on
17 this Motion.

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<u>United States v. State of Washington</u> 86 F. 3d 1499, 1502 (9 th Cir. 1996)	3

1 **I. INTRODUCTION AND STATEMENT OF FACTS**

2 Pursuant to Federal Rule of Civil Procedure (“F. R.C.P.”), 24, OCEANO PACKING CO, LLC.
 3 (“OCEANO” or “Intervening Plaintiff”), a California limited liability company, hereby moves this Court
 4 for intervention as a matter right in the instant matter under subsection (a)(2) of F.R.C.P.24, and
 5 alternatively, for permissive intervention under subsection (b)(1)(B) of F.R.C.P.24, for the purpose of
 6 filing OCEANO’s proposed Complaint-In-Intervention against each of the Defendants named in the instant
 7 matter (the “Defendants”).

8 The Plaintiffs in the action in which OCEANO is seeking to intervene, ASA FARM, INC. and
 9 BRAGA RANCH (herein, collectively referred to as the “ASA Plaintiffs”), are sellers of perishable
 10 agriculture commodities (herein, the “ASA Produce”), who assert that Defendant FRESH & HEALTHY,
 11 INC. (“FRESH”) failed to pay the ASA Plaintiffs the amount of \$318,971.60 for the ASA Produce. The
 12 ASA Plaintiffs further assert that they are beneficiaries of the trust provisions of the Perishable
 13 Agricultural Commodities Act, 7 U.S.C. Section 499e *et seq.* (“PACA”), which provides the ASA
 14 Plaintiffs with a floating, non segregated statutory trust on all of FRESH’s perishable agricultural
 15 commodities, and receivables, proceeds or assets derived therefrom (herein, the “FRESH PACA TRUST
 16 ASSETS”).

17 The ASA Plaintiffs further alleged that the other named defendants in their original Complaint are
 18 insiders of FRESH with responsibility for the daily management and costs of FRESH, and as such, are
 19 statutory trustees under PACA with responsibilities and liabilities to the ASA Plaintiffs for the monies
 20 owed to the ASA Plaintiffs by FRESH for the ASA Produce.

21 Similarly, OCEANO sold perishable agricultural commodities to FRESH (the “Oceano Produce”),
 22 for which it has not been paid the sum of \$101,127.39 by FRESH. OCEANO has similarly alleged that
 23 it is a beneficiary of the PACA statutory trust on the FRESH PACA TRUST ASSETS. OCEANO has also
 24 alleged that the other defendants named in the ASA Plaintiffs’ original Complaint are statutory trustees
 25 under PACA with responsibilities and liabilities to Oceano for the monies owed to OCEANO for the
 26 Oceano Produce.

27 The ASA Plaintiffs have obtained a preliminary injunction in their case which prohibits FRESH,
 28

1 the other named defendants and defendant COMERICA BANK ("COMERICA"), from selling the FRESH
 2 PACA TRUST ASSETS without agreement of the parties or further order of the Court.

3 OCEANO has an interest in the very same FRESH PACA TRUST ASSETS that are the subject
 4 of the preliminary injunction. OCEANO's interests in these FRESH PACA TRUST ASSETS will not be
 5 protected unless OCEANO is permitted to intervene in this action.

6 **A. Intervention As Of Right.**

7 Under the circumstances, the Court *must* permit OCEANO to intervene in this pending action under
 8 subsection F.R.C.P.24(a)(2) in order to file its Complaint-In-Intervention because OCEANO claims an
 9 interest relating to property that is the subject of the pending action, and OCEANO is so situated that
 10 disposing of the action may as a practical matter impair or impede OCEANO's ability to protect its
 11 interest.

12 **B. Permissive Intervention.**

13 Moreover, in the alternative, OCEANO should be permitted to intervene in this pending action
 14 under subsection F.R.C.P.24(b)(1)(B), in order to file its Complaint-In-Intervention because OCEANO
 15 has claims that share common questions of law and fact with this pending action filed by the ASA
 16 Plaintiffs.

17 **II. LEGAL ARGUMENT**

18 **A. Authority For Motion.**

19 F. R.C.P. 24 provides two methods for intervening in a pending action without the consent of the
 20 parties. Subsection (a) of Rule 24 outlines the circumstances for intervening as a *matter of right*, and reads
 21 in relevant part as follows:

22 (a) Intervention of Right. On timely motion, the court **must permit** anyone
 23 to intervene who:

24 ...
 25 (2) claims an interest relating to the property or transaction that is the
 26 subject of the action, and is so situated that disposing of the action may as
 27 a practical matter impair or impede the movant's ability to protect its
 28 interest, unless existing parties adequately represent that interest.

[Emphasis added]. Moreover, subsection (b) of Rule 24 outlines the circumstances for *permissive intervention*, and reads in relevant part as follows:

(b) Permissive Intervention.

(1) *In General.* On timely motion, the court **may permit** anyone to intervene who:

(B) has a claim or defense that shares with the main action a common question of law or fact.

[Emphasis added].

B. OCEANO Should Be Permitted To Intervene As “Of Right” In Order To File Its Complaint-In-Intervention Because Oceano Can Establish Each Of The Elements Under F. R.C.P. 24(a)(2).

Intervention as “of right” under F.R.C.P. 24(a)(2) involves a four part test: (1) a timely application; (2) the applicant has a “significantly protectible” interest relating to the property or transaction involved in the pending lawsuit; (3) disposition of the lawsuit may adversely affect applicant’s interest unless intervention is allowed; and (4) the existing parties do not adequately represent the intervenor’s interests. Arakaki v. Cayetano 324 F. 3d 1078, 1083 (9th Cir. 2003). The four-part test is interpreted broadly in favor of intervention. See Cabazon Band of Mission Indians v. Wilson 124 F. 3d 1050, 1061 (9th Cir. 1997).

OCEANO should be permitted to intervene as “of right” in order to file its Complaint-In-Intervention because OCEANO can establish each of the elements under F. R.C.P. 24(a)(2).

1. OCEANO's Motion For Intervention Is Timely Under The Circumstances Because The Pending Action Was Filed Less Than Two Months Ago, And There Is No Prejudice To The Existing Parties In Allowing Intervention By OCEANO At This Time.

Courts generally consider the following factors relevant to the issue of timeliness: (1) the stage of the proceedings at the time the applicant seeks to intervene; (2) prejudice to the existing parties from applicant's delay in seeking leave to intervene; and (3) any reason for and length of delay in seeking intervention, i.e. how long the prospective intervenors knew or reasonably should have known of their interest in litigation. See United States v. State of Washington 86 F. 3d 1499, 1502 (9th Cir. 1996); see also Engra, Inc. v. Gabel 161 F. 3d 814, 827 (5th Cir. 1992).

a. OCEANO's Motion For Intervention Is Timely.

OCEANO's Motion For Intervention is clearly timely because the ASA Complaint was filed less than two months ago, on January 8, 2008. Moreover, OCEANO did not immediately file its own Complaint after learning of the ASA Complaint and the Preliminary Injunction because counsel for

OCEANO has previously been told by counsel for Defendant FRESH, Steve O’Neil, Esq., that FRESH intended to file for bankruptcy protection, making any action in federal court subject to an automatic stay under bankruptcy law. OCEANO’s counsel memorialized these communications in a February 8, 2008 letter to counsel for FRESH, counsel to COMERICA, counsel to Plaintiffs in the ASA Complaint, and to other interested parties (the “February 8, 2008 Letter”). [See February 8, 2008 Letter attached as Exhibit “B” to OCEANO’s Proposed Complaint-In-Intervention, which Proposed Complaint-In-Intervention is in turn attached as Exhibit “A” to the Declaration of Effie Anastassiou In Support of Motion For Intervention (“Anastassiou Decl”)].

However, to date, on information and belief, Defendant FRESH has not filed for bankruptcy protection, and so OCEANO is now moving in a timely manner, less than two months after the ASA Complaint was filed, to intervene in this case.

b. There Is No Prejudice To The Existing Plaintiffs. In Fact, OCEANO Will Be Prejudiced If It Is Not Permitted To Intervene.

In addition, there is no prejudice to the existing parties permitting OCEANO to intervene into the case. In fact, OCEANO’s interest will be impaired if it is not permitted to intervene because the FRESH PACA TRUST ASSETS may be in the process of being dissipated and converted by Defendants.

In the February 8, 2008 Letter, counsel of OCEANO warned the parties not to take any actions which are adverse to OCEANO’s interests. [See Exhibit “B” to OCEANO’s Proposed Complaint-In-Intervention]. As of the filing of this motion, OCEANO has received no written response to its February 8, 2008 Letter or assurances by the parties who are Plaintiffs or Defendants in the ASA Complaint that the interests of OCEANO in the FRESH PACA TRUST ASSETS which are the subject of the Preliminary Injunction and the ASA Complaint will be protected. [See Anastassiou Decl’, at ¶ 3].

Despite the notice sent by OCEANO in the February 8, 2008 Letter, as referenced above, on February 25, 2008, FRESH, COMERICA, and counsel to Plaintiffs in the ASA Complaint, filed with this Court a Stipulation to Modify Preliminary Injunction (the “Stipulation to Modify”), which seeks to modify the Preliminary Injunction. [See Exhibit “C” to OCEANO’s Proposed Complaint-In-Intervention]. The Stipulation to Modify was signed by counsel for the parties on February 21, 2008 and February 22, 2008. Yet, OCEANO was never notified of the Stipulation to Modify nor consulted in any matter concerning the

1 Stipulation to Modify. [See Anastassiou Decl', at ¶ 4]. OCEANO only discovered that the Stipulation to
 2 Modify had been entered into through its monitoring of Court filings on PACER.[See Anastassiou Decl',
 3 at ¶ 4].

4 Concurrently with its Motion For Intervention, OCEANO is filing an Objection To Stipulation To
 5 Modify, objecting to the Stipulation to Modify in that it contains no provisions requiring notice to the
 6 creditors of FRESH, nor does it contain any requirements that the assets of FRESH be sold for fair market
 7 value. On information and belief, Defendant COMERICA may be selling the assets of FRESH for *less*
 8 than fair market value to one or more of the RESPONSIBLY CONNECTED PARTIES (as defined in
 9 Paragraph 27 of OCEANO's proposed Complaint-In-Intervention), to the harm and detriment of OCEANO
 10 and other creditors of FRESH.[See Anastassiou Decl', at ¶ 5].

11 **2. OCEANO Has A Significant Protectible Interest Relating To The FRESH**
 12 **PACA TRUST ASSETS.**

13 The "significant protectible interest" requirement is generally satisfied when the interest is
 14 protectible under some law, and there is a relationship between the interest and the claims at issue in the
 15 pending lawsuit. Arakaki v. Cayetano, *supra*. 324 F. 3d at 1083. The Ninth Circuit has stated that "a party
 16 has sufficient interest for intervention purposes if it will suffer a *practical impairment* of its interests as
 17 a result of the pending litigation." California ex rel. Lockyer v. United States 450 F. 3d 436, 441 (9th Cir.
 18 2006).

19 Here, OCEANO clearly has a significantly protectible interest as a beneficiary to the FRESH
 20 PACA TRUST ASSETS, and OCEANO 's claims in its Proposed Complaint-In-Intervention directly relate
 21 to such FRESH PACA TRUST ASSETS. Specifically, in the Fourth and Fifth Causes Of Action of
 22 OCEANO's Proposed Complaint-In-Intervention, OCEANO has made specific allegations regarding
 23 violation of the statutory trust provisions of PACA against the Defendants. [See OCEANO's Proposed
 24 Complaint-In-Intervention, at Pages 10-14, attached as Exhibit "A" to the Anastassiou Decl'].

25 The law provides that all of the assets of Defendant FRESH which were PACA trust assets never
 26 became property of the estate of FRESH because they are an equitable interest, and are subject to
 27 immediate turnover to the PACA claim holder. Equitable interests for the benefit of others are not part
 28 of the debtor's estate. See 11 U.S.C. § 541(d); Mid-Atlantic Supply, Inc. Of Virginia v. Three Rivers

1 Aluminum Co., 790 F.2d 1121 (4th Cir. 1986).

2 The beneficiary of a PACA trust is entitled to priority as to all PACA trust assets of the debtor,
 3 FRESH, ahead of administrative expenses, claims for attorneys' fees, and all claims of creditors, including
 4 those with valid security interests. See Tom Lange Co. V. Lombardo Fruit & Produce Co., 12 F. 3d 806,
 5 809 (8th Cir. 1993).

6 In addition, a party who receives trust funds (such as Defendant COMERICA BANK), knowing
 7 that there has been a breach of trust, does so at his peril. Only a bona fide purchaser for value without
 8 notice of the breach of trust may keep trust funds so transferred. See Consumers Produce Co., Inc. v.
 9 Volante Wholesale Produce, Inc., 16 F.3d 1374, 1380 (3rd Cir. 1984). Lenders with actual or constructive
 10 knowledge of a PACA trust are not bona fide purchasers and must refund any monies they receive in
 11 violation of the PACA trust. Such knowledge is imputed when the lender has a lien on PACA trust
 12 property and the lender knows that the debtor was engaged in the sale of perishable agricultural
 13 commodities. In re Richmond Produce Co., Inc., 112 B.R. 364, 377-378 (Bankr. N.D. CA 1990). In such
 14 circumstances, a debtor's secured lender is required to disgorge monies which the debtor paid in reduction
 15 of its debt to the secured lender, which monies are then used for the benefit of PACA trust beneficiaries.
 16 See In re Al Nagelberg & Co., 84 B.R. 19, 21-22 (Bankr. S.D. N.Y. 1988).

17 **3. The Disposition Of The Lawsuit Will Adversely Affect Oceano's Interest
 18 Unless Intervention Is Allowed Because Oceano Has An Interest In The Very
 19 Same PACA Trust Assets That Are The Subject Of The ASA Complaint.**

20 It must also be shown that disposition of the pending action would have a potential adverse impact
 21 on the would-be-intervenor's interest, ie. that it may "as a practical matter impair or impede the applicant's
 22 ability to protect that interest." SEC v. Navin 166 F.R.D. 435, 440 (N.D. Ca. 1995); Cunningham v. David
Special Commitment Ctr. 158 F. 3d 1035, 1038 (9th Cir. 1998).

23 The disposition of the pending lawsuit will adversely affect OCEANO's interest unless intervention
 24 is allowed because OCEANO has an interest in the very same FRESH PACA TRUST ASSETS that are
 25 the subject of the Preliminary Injunction obtained by the ASA Plaintiffs. If the FRESH PACA TRUST
 26 ASSETS are distributed to the ASA Plaintiffs, COMERICA, or other third parties without the consent of
 27 OCEANO, then OCEANO may be irreparably harmed, as there may be no remaining FRESH PACA
 28

1 TRUST ASSETS to satisfy OCEANO'S obligations.

2 **4. The Existing Plaintiffs To The Pending Lawsuit Do Not Adequately Represent
3 The Intervenor's Interests Because The ASA Plaintiffs**

4 Only a minimal showing is required to establish that the existing Plaintiffs to the pending lawsuit
5 do not adequately represent the intervenor's interests. Arakaki v. Cayetano, supra. 324 F. 3d at 1083. A
6 would-be-intervenor meets its minimal burden by showing the existing parties have interests adverse to
7 his. Sagebrush Rebellion, Inc. v. Watt 713 F. 2d 525, 528 (9th Cir.1983).

8 Here, as noted above, OCEANO has an interest in the very same FRESH PACA TRUST ASSETS
9 that are the subject of the Preliminary Injunction obtained by the ASA Plaintiffs. Yet, to date, the ASA
10 Plaintiffs have not formally recognized OCEANO's interests in the FRESH PACA TRUST ASSETS, nor
11 consulted with OCEANO on such important matters as the proposed modification of the Preliminary
12 Injunction, despite OCEANO's written request that they do so.

13 **C. Alternatively, OCEANO Should Be Permitted To Intervene In Order To File Its
14 Complaint-In-Intervention Because OCEANO Has Claims That Share Common
15 Questions Of Law And Fact With The Pending Action.**

16 The existence of a common question of law or fact is liberally construed. Kootenai Tribe of Idaho
v. Veneman 313 F. 3d 1094, 1108-1109 (9th Cir. 2002).

17 Here, there are clearly common questions of law and fact. Both the ASA Complaint and
18 OCEANO's Proposed Complaint-In-Intervention contain specific causes of action regarding the FRESH
19 PACA TRUST ASSETS, as well as allegations regarding the unlawful dissipation and conversion of such
20 assets by Defendants. [See ASA Complaint, at Pages 7-9; see also OCEANO's Proposed Complaint-In-
21 Intervention, at Pages 10-14, attached as Exhibit "A" to the Anastassiou Decl'].

22 Moreover, both the complaints name precisely the same parties, including Defendant COMERICA
23 BANK, which may be involved in unlawfully dissipating and converting the FRESH PACA TRUST
24 ASSETS.

25 **III. CONCLUSION**

26 As a result of the foregoing, pursuant to F. R.C.P. 24(a)(2) and (b)(1)(B), and applicable case law,
27 this Court *must* permit OCEANO to intervene in this pending action under subsection (a)(2) of Rule 24
28 in order to file its Complaint-In-Intervention. Alternatively, OCEANO requests that this Court permit

1 OCEANO to intervene in this pending action under subsection (b)(1)(B) of Rule 24 in order to file its
2 Complaint-In-Intervention.

3 Dated: February 27, 2008

ANASTASSIOU & ASSOCIATES

4 

5 Effie F. Anastassiou
6 Attorneys for Intervening Plaintiffs
OCEANO PACKING, CO., INC.

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